No. 9055

# United States Circuit Court of Appeals

## For the Ninth Circuit

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CITY AND COUNTY OF SAN FRANCISCO, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

**OPENING BRIEF FOR APPELLANT FOLLOWING ARGUMENT ON MAY 19, 1939.**

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## Table of Contents

## Table of Authorities Cited

### Cases

## Statutes

## Texts and Authorities

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During the Argument on May 19, 1939, information was asked and inquiries put from the Bench which prompted Counsel for Appellant to suggest that it might be helpful if briefs were filed to deal therewith. Accordingly, the Court allowed time, the appellant to open and close, and the appellee to reply to the opening brief of appellant.

This is the Opening Brief of Appellant.

We intend to deal only with The Statute and The Contract.

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## I. THE STATUTE.

### INTRODUCTION.

The Raker Act was approved December 19, 1913 (38 Stat. 242).

The provision involved reads as follows:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a mu-

> nicipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

This prohibition was dictated (perhaps without revision), by President Theodore Roosevelt in 1906 in respect of an earlier statute, as we later narrate, and involves (so we think) an ellipsis (familiar to grammarians and rhetoricians) defined as follows: "Omission of word or words, usually such as will be inevitably supplied by the mind, or understood, in the construction of a sentence" (Wyld's Universal English Dictionary, 1936); "Omission of word or words easily understood but necessary to the grammatical construction" (Macmillan's Modern Dictionary, 1938); "The omission of a word or words necessary to the complete construction of a sentence but not required for the understanding of it" (Standard Dictionary, 1908); "Omission from a construction of one or more words, which are obviously understood, but which must be supplied to make the expression grammatically complete, etc." (Webster's International Dictionary, 1919). "The omission of one or more words in a sentence, which would be needed to complete the grammatical construction or fully to express the sense" (The Oxford Dictionary (1897)).

*In re Lippincott's Estate,* 276 Pa. 283, 120 Atl. 136 (1923), says (p. 137, c. 2 foot):

> "An elliptical form of expression is quite common in writing and speaking alike, and perhaps in wills and contracts most of all. It is not necessary to repeat things that have just been expressed; they are understood to be in the mind of the speaker or writer, and the listener or reader likewise understands them, without repetition. In Goold Brown's Grammar of English Grammars it is said, at page 815:

> " 'Ellipsis is the omission of some word or words, which are necessary to complete the construction, but not necessary to convey the meaning. Such words are said, in technical phrase, to be understood; because they are received as belonging to the sentence, though they are not uttered. Of compound sentences, a vast number are more or less elliptical; and sometimes, for brevity's sake, even the most essential parts of a simple sentence are suppressed. There may be an omission of * * * even a whole clause, when this respects what precedes.' "

In wills (and the same is true in respect of other writings), words may be interpolated or transposed. *Estate of Goetz,* 13 Cal. App. 292, 295 (1910); *In re Stratton,* 112 Cal. 513, 518 (1896).

In some instances, an ellipsis consists in the omission later of what had been expressed before; but the same rule of construction is applicable of course where the omission of words is at the beginning but clearly indicated by what follows, as in this case.

**The Ellipsis: Omissions Supplied.**

We submit that the meaning of Section 6 is made the clearer by the introduction of the supplied words underlined and bracketed in the text below, thus making the section read as follows:

> "Sec. 6. That the grantee is prohibited from ever selling or letting [any water or electric energy] to any corporation or individual, except a municipality or a municipal water district or irrigation district, [with] the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

We wish to rivet attention on the word "given" because it was contained in the first draft of the prohibition, was not there associated with the words "sold or" but stood alone. The words "sold or given" appeared for the first time in the second draft. All this is shown infra.

We submit the word "given" in the first draft clearly referred to the words "selling or letting", and meant as indicated by the supplied words which follow: "the water given [i. e., by way of sale or lease, as aforesaid] to it or him by the city"; and that it referred to nothing else than the act of "selling or letting" which was the correlative of the word "given".

The word "give" has many meanings, but when it is read in the environment in which we find it here, it deals with transfer of title through "selling or letting".[1]

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[1] "The word 'grant' is synonymous with 'give'. (Webster's Dictionary)". *Gurnsey v. Northern California Etc. Co.*, 7 Cal. App. 534, 544 foot (1908). "Ordinary and accepted meanings of 'give' and 'receive' are synonymous with those of 'grant' and 'accept'." *Standard Oil Co. of Indiana v. United States* (C. C. A. 7, 1908), 164 F. 376, 390 foot; *United States v. Bunch* (D. Ct. Ark. 1908) 165 F. 736, 739 foot. "The word 'given' as used in statute modifying the rule in Shelley's case [such as Section 779, C. C. Cal.] means conveyed." (Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738, syl. (1919).)

"The word 'give' is as expressive of a transfer of title as the word 'sell' " (In re Soulard's Estate, 141 Mo. 642, 43 S. W. 617, 622, c. 2, ls. 49-51 (1897)), and while in proper context, it would mean a transfer of title without consideration, it does not exclude a transfer of title upon consideration. Latimer v. Bruce, 151 Ga. 305, 106 S. E. 263 (1921) held that an answer alleged "a contract upon a valid consideration" although the promise alleged was that "he would give her the property". The opinion says that "the word 'give' as employed in the answer, when considered in connection with the context, does not denote a technical gift" (p. 263, c. 2 middle). In times past words of conveyancing were "to give, grant and confirm" land to A. If the consideration was money, the deed operated as a bargain and sale, and if not for money, it was good as a covenant to stand seised. Harrison v.

The addition of the words "sold or" in the second draft of the prohibition did not alter the meaning of "given" as it stood in the first draft; and that word refers to both "selling" and "letting", but inasmuch as sale is specifically mentioned, the effective function of the word "given" thenceforth has been to connect with "letting". Of course, when the word "given" stood alone it had as correlatives both "selling" and "letting", but the draftsman for Congress, with a passion for repetition or to make assurance doubly sure, added the words "sold or", thus giving us "sold or given". If the word "given" in this connection had no historical background and its meaning were doubtful, interpretation would attribute to it a definition akin or having relation to the word "sold", say, as involving, transfer of title. The maxim of *Noscitur A Sociis* (46 Corpus Juris 496) would apply ("The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it")—a maxim akin to *Ejusdem Generis* (19 Corpus Juris 1255).

When these drafts were drawn, it is to be presumed that the idea of a municipality making a gift of water or electric energy to a corporation or individual was not thought of, and that therefore, as a matter of actual intent, that possibility was not present in the minds of

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Austin, 3 Mod. 237, 87 Reprint 154 (1793); Cheney's Lessee v. Watkins, 1 Harris & Johnson 527, 2 Am. Dec. 530 (1804); Young v. Ringo, 17 Ky. (1 T. B. Mon.) 30 (1824); Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406 (1871). In Carter v. Alexander, 71 Mo. 585 (1880) it was held that the word "give" in a contract so far as it was related to land should be taken in the sense of "convey".

Evenson v. Webster, 3 So. Dak. 382, 53 N. W. 747 (1892) held that the instrument under review was a grant, although the word used was "give".

those who drafted or adopted the prohibition. Indeed, if it had been in mind the idea would have been instantly dismissed on the theory that there are common law and statutory prohibitions against the gift of public property by municipalities.

This is quite apart from what might happen if the Municipality should undertake to make a gift of the water or electric energy to a corporation or individual.

It is quite conceivable that an additional argument would then be made that as Section 6 forbade a transfer of title upon consideration, if conjoined with a right of resale, etc., then a similar prohibition should be spelled out of the words "selling or letting", to prohibit a gift with right of sale, etc., in the donee. It is in line with this idea that it was said in Outline of Oral Argument, p. 7: "Section 6 of the Raker Act prohibits (a) sale for resale; (b) gift for sale; and (c) leasing ('letting') for subleasing (to 'sublet')".

There is no merit in the argument of the Government (Br. p. 64 foot) that Congress was not using "selling or letting" to indicate a transfer of title, i. e., for all time (in the case of a sale) and for a specified period (in the case of letting).

The whole idea was that title of the Municipality to the water or electric energy should not pass to another coupled with the right of that other to resell or sublet.

The foregoing is a sufficient reply to what the Government Brief, p. 65, says about the words "sold or given". It is clear that "given" has many significations, but with the environment in which we here find the word it is clear

that its correlative in the first draft and in all following drafts, was "selling or letting" and that the fundamental idea underlying the word "given" was a transfer of title to water or electric energy.

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (Towne v. Eisner, 245 U.S. 418, 425 (1918).)

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Two views have been expressed as to the interpretation of Section 6.

To bring out the first view we must start with the assumption that San Francisco is the vendor of the commodity (water or electric energy) and that a corporation or an individual is the vendee. The vendor is not forbidden to sell the commodity (abstractly) but it is forbidden (in the event it sells) to sell with it the right of the buyer itself or himself to sell. In other words, the vendor is forbidden to put through any form of sale which carries with it the right unto the buyer itself or himself to sell; i. e. the vendor must make a qualified and restricted sale, not an outright and unqualified one.

The prohibition is akin to a covenant against assignment or subletting in a lease; and akin to a deed, with building and other restrictions qualifying and restricting the general words of a grant and the enjoyment thereof.

The second view of interpretation of Section 6 is based (so it seems to us) on an unduly rigid adherence to the letter of Section 6 and is to the effect that Section 6 has nothing to do with a sale of a commodity by vendor to

vendee but is limited to a sale of "the right to sell", something akin to or in the nature of, if not in fact and law, a franchise to sell.

Article XIV, Section 1 of the California Constitution of 1879 provides:

> "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied etc. [here provision is made for the annual fixing of rates by the governing legislative bodies of municipalities, a power since then transferred to the Railroad Commission]. . . . Any person, company, or corporation collecting water rates in any city and county, or city, or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city, or town, where the same are collected, for the public use."

See the law relating to franchises to furnish water in "Waters", 26 Cal. Jur. 476, and relating to franchises to furnish electricity in "Electricity", 10 Cal. Jur. 176. See, also, *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368 (1899).

The second theory of interpretation of Section 6, if adopted, would lead to problems not yet worked out and to unique situations.

In the period 1918-1923, the Municipality sold electric energy from the Early Intake plant to the Sierra and San Francisco Power Company, all within Tuolumne County (Br. a.c. 12-20). If Section 6 did not prohibit sale for resale, then the Company became possessed of an unqualified title to the energy sold, and lawfully distributed it

without any franchise or license from San Francisco; indeed, San Francisco did not have any authority to sell, grant or otherwise confer a franchise on the Sierra and San Francisco Company for operation in Tuolumne County.

Inasmuch as the Municipality might sell Hetch Hetchy water or electric energy at points along its lines which cross Tuolumne, Mariposa, Stanislaus, San Joaquin and Alameda Counties, the buyers in such instances would not need any franchise of "right to sell" emanating from San Francisco and unless the sale of the water or electric energy was restricted so as to forbid the buyer to resell, Section 6 would have no operative effect.

Again, when the Raker Act was passed in 1913 the Spring Valley Water Company had a constitutional franchise to distribute water in San Francisco (*Lukrawka v. Spring Valley Water Co.,* 169 Cal. 318 (1915)) which was in perpetuity and could neither be revoked nor impaired by any legislation, constitutional or statutory (*Russell v. Sebastian,* 233 U. S. 195 (1914)); and the Pacific Gas and Electric Company had the constitutional franchise, provided in Article XI, Section 19 of the constitution of 1879 hereinbelow quoted to distribute electric energy in San Francisco. The Spring Valley Water Company was incorporated prior to the Constitution of 1879, but it acquired a constitutional franchise between 1879 and 1911. Pacific Gas and Electric Company was incorporated in 1905 and acquired the above constitutional franchise from its predecessors in interest (*South Pasadena v. Pasadena Land etc. Co.,* 152 Cal. 579 (1908)), and itself acquired the constitutional franchise between 1905 and 1911 (*Matter of Keppel-*

*mann,* 166 Cal. 770 (1914) involving an employee of that company).

The history of these companies, although not a part of the record, is found in innumerable decisions of courts of California, federal and state. Of all of this, the Court will take appropriate notice.

> "We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." (Mr. Justice Field in Ho Ah Kow v. Nunan (1879), Fed. Cas. No. 6546, 12 Fed. Cases 252).

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The provision which gave rise to these constitutional franchises is Article XI, Section 19 of the California Constitution of 1879, amended fundamentally in 1911. Both texts follow.

In force from 1879 to 1911, Art. XI, s. 19, Constitution:

> "§19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

In force since 1911, Art. XI, s. 19, Constitution:

> "§19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance. [Amendment adopted October 10, 1911.]"

If the second view of the interpretation of Section 6 is the correct one then it was possible for the Municipality (until it acquired the properties of the Spring Valley Water Company) to sell all of the Hetch Hetchy water to the Spring Valley Water Company, which the Company could distribute under its constitutional franchise and not be in need of any franchise from the Municipality. So likewise in respect of the electric energy which could be sold to the Pacific Gas and Electric Company for the purposes specified in the constitution.

In these circumstances Section 6 would have no effect whatever.

The foregoing considerations do not take into account that Congress could not (so we submit) (a) in the exercise of its lawmaking power regulate or control the grant of franchises by a municipality acting as the agent of the state, nor (b) enter into a contract with the Municipality

whereby the latter would bind itself in respect of governmental action, authority for which had been delegated to it by the state.

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The Government brought this action and the case was tried on the theory that Section 6 forbade sale for resale and that the contract of July 1, 1925 was a contract of sale for resale. (See Complaint pars. VIII and XVIII pp. 6, 9) The court below so decided.

If the second view of interpretation is found to be sound, the judgment should be reversed inasmuch as neither in pleading nor proof did the Government bring forward this view.

The burden of combating the second view is therefore upon the Government.

However, as we believe the true interpretation of Section 6 is that it forbids sale for resale and nothing more (as applied to the facts of this case), we give below the reasons which we have to support that view.

We also deal with other phases of The Statute, and later, briefly consider The Contract.

**(a) The Government and the Municipality are agreed that Section 6 prohibits sale for resale. (We reserve for later consideration the argument for the Government that Section 6 prohibits more and the claim of the Municipality that it prohibits nothing more.)**

Stripped of all words unnecessary to present purposes, Section 6 reads as follows:

> "Sec. 6. That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual

> . . . the right to sell . . . the water or the electric energy sold . . . to it or him by the said grantee [San Francisco]''.[1a]

In considering the language just quoted, the first fact which should be permitted to fasten itself in the mind is (so we submit) that Section 6 is treating of (or has in contemplation) (or is making provision in respect of) a sale (of either water or electric energy) by the grantee (here the City and County of San Francisco) to a corporation or an individual. This fact is fully manifested (so we think) by the words "the water or the electric energy sold . . . to it [the corporation] or him [the individual] by the said grantee".

We submit that Section 6 is to be read as a provision treating of a sale of water or electric energy by the grantee, i. e., the Municipality, to a corporation or an individual.

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Section 6 does not prohibit the Municipality from selling water or electric energy to a corporation or an individual but it does put a restriction on such sales by

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[1a]Section 6 in drafts of earlier bills which eventuated in the Raker Act provided "that the City and County of San Francisco is prohibited" but as rights were given in the bills to nearby municipalities, etc. the term "City and County of San Francisco" was changed to "grantee", and the word "grantee" defined in Section 8 as follows:

> "Sec. 8. That the word 'grantee' as used herein shall be understood as meaning the City and County of San Francisco and such other municipalities or water district or water districts as may, with the consent of the City and County of San Francisco or in accordance with the laws of the State of California, hereafter participate in or succeed to the beneficial rights and privileges granted by this Act."

providing that the Municipality shall not sell to the buyer the right (itself or himself) to sell.

The only way in which the vendor of a commodity can withhold from the vendee the right himself in turn to sell the commodity is by imposing a restriction in the transfer (found frequently in commercial life) whereby the sale is upon condition that the commodity is for "buyer's own consumption" or "buyer's own use" or upon kindred condition.[2]

To sum up, the Raker Act confers upon the grantee or recognizes that the grantee has the right to sell; and Section 6 does not attempt to take away that right. It does forbid the Municipality to sell in circumstances which would give the buyer the right himself to sell. The requirements of the law can only be achieved by a sale limited to purposes other than for resale.

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[2]*Wilder Manufacturing Co. v. Corn Products Co.*, 236 U.S. 165 (1915) involved a contract of sale where the vendee "bought the goods exclusively for purchaser's own use."

*Fosburgh v. California & Hawaiian Sugar Refining Co.*, (CCA 9, 1923) 291 Fed. 29 dealt with a contract by a sugar refining company to sell sugar to a candy company wherein it was provided that "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same".

An unlimited sale of a patented article is free from all restrictions and the purchaser is entitled to resell (*Keeler v. Standard Co.*, 157 U.S. 659 (1895); *Free Co. v. Bry-Block Co.* (D. Ct. Tenn. 1913) 204 Fed. 632) but suitable restrictions are very commonly employed to cut off any right to resell.

*United States v. General Electric Co.*, 272 U.S. 476, 489 (1926) holds that the manufacturer of a patented article may seek to dispose of his product directly to the consumer.

Wines and liquors are sold "not to be drunk on the premises where sold" (*John Rapp & Son v. Kiel*, 159 Cal. 702, 704 (1911); see, also, *Sandelin v. Collins*, 1 Cal. 2d 147 (1934); *Bath v. White*, 3 C.P.D. 175 (1877-1878); 18 *Halsbury's Laws of England* 116.

This is all well put in an Opinion of Solicitor Nathan R. Margold of the Department of the Interior, rendered to Secretary Ickes October 27, 1933 (54 I.D. 316)[3] upon the rights and obligations of San Francisco under the Raker Act.

Therein he makes clear that the Municipality has the right to sell water or energy to private companies, provided the latter buy for their own use and not for resale.

Mr. Margold says:

> "The rights and obligations of the city and county of San Francisco in this connection depend upon the Act of December 19, 1913, (38 Stat. 242), commonly known as the Raker Act. Section 1 of the act states that the grant to the city and county of San Francisco is made, among other purposes, 'for the purpose of constructing, operating, and maintaining power and electric plants, poles and lines for generation and sale and distribution of electric energy.' Section 9(l) of the act states that the grantee, after making provision for certain requirements of the Modesto and Turlock Irrigation Districts, and municipalities therein, may 'dispose of any excess electrical energy for commercial purposes.' Section 9(m) further refers to the development of electric power for 'commercial use.' It is therefore reasonably clear that it was contemplated by Congress that under certain circumstances power developed at Hetch Hetchy should be sold to private companies."

After quoting Section 6, Mr. Margold continues:

> "I wish particularly to emphasize the fact that this section prohibits . . . the transfer by the municipality . . . of any right to resell or sublet any electric energy which it may sell to a private company.

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[3]Solicitor Margold's Opinion has not been heretofore called to the attention of the Court. In Secretary Ickes' Opinion (R. 243) reference is made thereto, but it is erroneously cited, without title, as appearing in 51 I. D. 316, whereas the citation should have been 54 I. D. 316.

Solicitor Margold's Opinion.

> "Since the city and county of San Francisco may properly sell power so developed to a private company if the company is going to consume it, but since the sale would clearly not be proper if it expressly included any right in the purchaser to resell or sublet the power, it is my opinion that the municipality would violate the act if it were blindly to sell energy to a private company which notoriously uses electric power for resale rather than for consumption. I therefore suggest that Mr. Burkhardt be notified that the city and county of San Francisco may sell electric power developed at the Hetch Hetchy site to a privately-owned electric utility company only if the municipality first receives convincing assurance that all such power will be consumed by the company and will in no instance be resold or redistributed."

The only criticism which can be made of Secretary Margold's Opinion is that it did not go far enough. It should have said, we think, that every transfer by the Municipality of water or electric energy should be limited by a provision that the commodity was for the buyer's own use and not for resale.

The view thus stated by Solicitor Margold represents the interpretation which has been put upon the prohibitions of Section 6 for the past twenty-five years and there has been no departure therefrom by either party to this action in that long period.

Solicitor Margold's Opinion was the third by a Solicitor of the Department of the Interior that the section forbade sale for resale. The first was by Solicitor Edwards, June 8, 1923 (Br. a.c. 18); the second was by Acting Solicitor Wright, July 20, 1925 (Br. a.c. 28), and the third was that of Solicitor Margold himself, October 27, 1933. These three opinions were followed by the Opinion of Secretary Ickes August 24, 1935 (R. 232).

The Municipality has claimed that the prohibition would yield in circumstances of dire necessity, as, for instance, during construction and in circumstances making performance impossible or the like, on the theory that the letter of the prohibition should yield to the spirit of it in the presence of such circumstances, under the views expressed in *Ex parte Lorenzen,* 128 Cal. 431, 438 foot (1900) and *Sorrells v. United States,* 287 U.S. 435, syllabus; 446-448, particularly 447 (1932).

The Municipality, however, recognized the prohibition as one levelled against sale for resale; and this fact is emphasized by its claim to exemption in circumstances of necessity as just stated.

The parties to this litigation therefore have uniformly agreed that Section 6 was a prohibition of sale for resale, and that the section was dealing with a sale of a commodity, i. e., water or electric energy by the Municipality to a corporation or an individual.

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On one occasion an argument was made before Secretary Ickes, of which he makes mention in his opinion (R. 241-242) where he says:

**Secretary Ickes' Opinion.**

"It has been argued that a direct sale of power by San Francisco to the Pacific Gas and Electric Company for the express purpose of resale would not constitute a violation of the prohibitions contained in section 6 for the reason that the company, as a public utility, already has the right to sell power to consumers, and, thus, need not be invested by the

City and County with that right in violation of the statutory prohibitions.[4] This contention confuses the right or authority of the company to sell power in general to consumers with its right to sell them the power generated through the operation of the Hetch Hetchy project. It also confuses the authority of a private corporation, under the terms of its charter and the provisions of laws creating it, to dispense among consumers such electric energy as it is in a position legally to control with the disability of the City and County of San Francisco, under the terms of the Hetch Hetchy grant, to sell or let Hetch Hetchy water or power to such a corporation for purposes of resale to consumers. In each instance, it is the latter, not the former, that is in issue here.''

**(b) The genesis of Section 6: Section 6 of the Raker Act was copied from Section 6 of The Owens River Grant to Los Angeles, approved June 30, 1906 (34 Stats. 801), which had been incorporated in the Los Angeles grant at the request of President Theodore Roosevelt and in words dictated by him. The circumstances we submit reenforce the conclusion that the purpose of Section 6 in both acts was to prohibit sale for resale.**

The Owens River Grant to Los Angeles preceded The Raker Act by more than seven years.

The grant to Los Angeles was passed in the 59th Congress, 1st Session, and the proceedings in respect thereof appear in 40 Cong. Rec. The references to pages below are to that volume.

The bill which, with amendments, became the approved law was introduced in each House June 12, 1906 (p. 8307, c. 1, middle; p. 8371, c. 1 middle) (S. 6443, H.R. 20151).

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[4]This argument was made May 6, 1935 (R. 233) on behalf of the San Francisco Chamber of Commerce and other kindred civic organizations.

The Senate passed the Senate Bill 6443 June 13, 1906 (pp. 8374-8375) and it reached the House June 14, 1906 (p. 8530, c. 1 foot).

Section 1 thereof as it stood in the House June 25, 1906 contained a grant of "all necessary rights of way . . . for the purpose of constructing, operating, and maintaining canals, ditches, pipes and pipe lines, flumes, tunnels and conduits for conveying water to the city of Los Angeles for domestic purposes only and not for the purpose of irrigation".

The underlined provision was objectionable to Los Angeles because it desired to acquire a volume of water adequate for its domestic purposes in the future and to that end, to employ the water in the interim for the purpose of irrigation, to protect its appropriations.

Los Angeles therefore desired the elimination of the restriction, but Secretary of the Interior Ethan Allen Hitchcock favored its retention.

To settle the differences between Los Angeles and the Secretary of the Interior, the bill being still in the House, a conference was had with President Theodore Roosevelt at The White House, June 25, 1906, at the conclusion whereof he dictated a letter reading, in part, as follows:

> "The White House, Washington, June 25, 1906.[5]
> My dear Mr. Secretary:
>
> As I think it best that there should be a record of our attitude in the Los Angeles Water Supply Bill, I am dictating

[5]First Annual Report of the Chief Engineer of the Los Angeles Aqueduct to the Board of Public Works, March 15, 1907 (pp. 26, 27). (Mechanics-Mercantile Library, San Francisco, **628.1, L 87.)

**President Theodore Roosevelt's letter June 25, 1906.**

this letter to you in your presence, and that of Senator Flint on behalf of the California Delegation, of Director Walcott of the Geological Survey, and of Chief Forester Pinchot. The question is whether the City of Los Angeles should be prohibited from using the water it will obtain under this bill for irrigation purposes. Your feeling is that it should be so prohibited. . . .

Senator Flint states that under the proposed law Los Angeles will be seeking to provide its water supply for the next half century, which will mean that at first there will be a large surplus, and that in order to keep their rights they will have to from the beginning draw the full amount of water (otherwise the water will be diverted to other uses and could not be obtained by the city) . . .

Messrs. Walcott and Pinchot state that there is no objection to permitting Los Angeles to use the water for irrigating purposes so far as there is a surplusage after the City's drinking, washing, fire and other needs have been met. . . .

I am informed by Senator Flint that the law of California provides that if a municipality sells water to people outside the municipality, it must be at same rate that it sells to those within the municipality.

. . . . . .

Under the circumstances, I decide, in accordance with the recommendations of the Director of the Geological Survey and the Chief of the Forestry Service, that the bill be approved, with the prohibition against the use of the water by municipality for irrigation struck out. I request, however, that there be put in the bill a prohibition against the City of Los Angeles ever selling or letting to any corporation or individual except a municipality, the right for that corporation or the individual itself to sell or sublet the water given to it or him by the City **for irrigation purposes**.

Sincerely yours,

Theodore Roosevelt.

P. S.—Having read the above aloud, I now find that everybody agrees to it,—you Mr. Secretary, as well as Senator Flint, Director Walcott and Mr. Pinchot, and therefore I submit it with a far more satisfied heart than when I started to dictate this letter.''

Between June 26, 1906 and June 30, 1906, the following Congressional happenings took place: (a) The House adopted a Substitute Bill which, among other things, struck out the limitation and added Section 6 here below quoted—all in accordance with the foregoing views of President Roosevelt; (b) the Senate passed the Substitute Bill; and (c) the latter became a law upon the approval thereof by the President (June 30, 1906) (40 Cong. Rec. pp. 9342 c. 2, ft.—9343, c. 1 top; p. 9390, c. 1 foot; p. 9496, c. 2; pp. 9665, c. 2—9666, c. 1; p. 9723, c. 2; p. 9801, c. 2 top).

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Section 6 of the Los Angeles grant which thus became a law read as follows:

> "Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."

For convenience, we give the prohibition as drafted by President Theodore Roosevelt, and as enacted:

| President Theodore Roosevelt June 25, 1906 | The Owens River Grant Approved June 30, 1906. |
|---|---|
| . . . that . . . the City of Los Angeles [is prohibited from] ever selling or letting to any corporation or individual except a municipality, the right for that corporation or the individual itself to sell or sublet the water given to it or him by the City for irrigation purposes. | That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city. |

The following differences of consequence in the foregoing are to be noted (a) the words "for irrigation pur-

poses'' used by President Roosevelt do not appear in the approved grant; and (b) the text of the approved grant contains the words ''sold or'' which are not contained in the President's letter.

It is to be observed from President Roosevelt's letter that he was thinking in terms of sales or leases by Los Angeles to corporations or individuals for irrigation purposes and that he wished to be assured that such sales or leases would be for the buyers' own use and not for resale or subletting. It is also to be observed that President Roosevelt was thinking of irrigationists who might be living in Inyo, Kern or Los Angeles Counties, outside the city of Los Angeles, through which the granted right of way was to run; and he was not thinking of a franchise from the City of Los Angeles authorizing the sale or subletting of water in those three counties.

When the prohibition was drafted for insertion in the bill (after the conference with the President) it was concluded that there should be a restriction against sale for resale of all water whether for irrigation or otherwise.

The Owens River Grant involved the generation of electric energy but there was no provision in the bill against sale or subletting thereof for resale or subletting. This was undoubtedly due to the circumstances under which the prohibition was formulated. It all turned on the question of the disposition of water for irrigation purposes. This was the concrete problem presented to the President and no account was taken by him of electric energy nor of water except for irrigation purposes.

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The prohibitions in Section 6 of the Hetch Hetchy grant, took slightly varied forms from time to time in

the progress of the bills through the two Houses as will later appear. In the meantime it may be useful to contrast the text of the prohibition in the Los Angeles grant with the text of the prohibition in the Hetch Hetchy grant when first introduced and for that reason we put them in parallel columns below.

| The Owens River Grant. (Approved June 30, 1906) | Hetch Hetchy Grant. (Earliest form, H. R. 112, April 7, 1913) |
|---|---|
| "Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city." | "Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county." |

It will be noted that the text of each of the foregoing is identical with that of the other except that in the text of 1913 (a) "the city and county of San Francisco" has been substituted for "the city of Los Angeles"; (b) the word "private" has been inserted before "corporation or individual"; and (c) the words "city and county" have been substituted for "city".

We now contrast the text of Section 6 of the Los Angeles grant as enacted (1906) with Section 6 of the San Francisco grant (1913) as enacted.

| The Owens River Grant. (Approved June 30, 1906) | The Hetch Hetchy Grant. (Approved December 19, 1913) |
|---|---|
| "Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a | "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality |

| | |
|---|---|
| municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city.'' | or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee'' etc. |

Several differences may be noted between Section 6 of the Raker Act as enacted and the Los Angeles grant. They are these:

(a) The words ''The grantee'' are substituted for ''the city of Los Angeles''. (Section 8 of the Raker Act defines ''grantee'' to include the City and County of San Francisco and other municipalities, etc.)

(b) In the grant of 1906, the words are ''except a municipality''; in the grant of 1913, as enacted, the words are ''except a municipality or a municipal water district or irrigation district''.

(c) The words ''for such corporation or individual'' in the 1906 text have been deleted from the section as enacted in 1913.

(d) The words ''or the electric energy'' have been added in the 1913 grant as enacted.

It is clear from the foregoing that the language employed in Section 6 of the Raker Act is that of President Theodore Roosevelt and that in 1906 he was expressing the idea that a sale or lease of water for irrigation purposes by Los Angeles should not carry a right to the buyer to resell or sublet. The President was not considering, so we think ourselves entitled to assume, any legalistic questions. It must be assumed that he was aware, subconsciously perhaps, that a sale or lease of water without re-

strictions would afford the purchaser a right to resell or sublet. This he desired to prevent and he expressed the purpose in language different than would have attended a similar effort by an outstanding legislative draftsman of long professional and technical training. We submit however that the President expressed his purpose and that he made it clear that the prohibition was aimed at unrestricted sales and leases and that his words enjoined that sales and leases should carry limitations denying rights of resale or subletting, if, when and as necessary.

**(c) The varied forms of Section 6 of the Raker Act from the first bill introduced April 7, 1913, to the approval of the grant December 19, 1913, will be aids to a sound interpretation, and accordingly, we give them here.**

There had been efforts to obtain Congressional concessions from the Government in respect of Hetch Hetchy Valley and other public lands within the period May 16, 1908 and April 25, 1911, but the measures failed of enactment.

The proceedings were in the sessions of Congress below mentioned and in the volumes of the Congressional Record at the pages noted below:

60th Congress, 1st Session, May 16, 1908; 42:6440; 60th C. 2nd S., January 6, 1909, February 1, 1909, February 8, 1909; 43:566, 1662, 2065; 61st C. 1st S., March 19, 1909, March 22, 1909; 44:115, 136, 62nd C. 1st S., April 25, 1911, 47:625.

There was an interregnum of two years until Mr. Raker proposed the legislation which eventuated in The Raker Act.

Five Hetch Hetchy Bills were introduced by Representative Raker of California in the 63rd Congress, 1st Session, and referred to the House Committee on the Public Lands. (The proceedings in respect thereof appear in 50 and 51 Congressional Record.)

The first four were early forms of the grant and the fifth, H.R. 7207, was the bill which with amendments became "The Raker Act," approved December 19, 1913 (38 Stats. 242).

Section 6 appeared in all five Bills and in the Act as it became a law with varied texts as below.

(1) **H.R. 112, introduced April 7, 1913:**

> "Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county, but the rights herein granted to said city and county of San Francisco are for the exclusive use of said city and county and its inhabitants, and for such other municipalities and the inhabitants thereof in the territory surrounding San Francisco Bay, or nearby, in California, as may, with the consent of said city and county, hereafter participate in the enjoyment of the privileges herein granted."

(2) **H.R. 4319, introduced April 25, 1913:**

> "Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any corporation or individual, except a municipality or municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the said city and county."

(3) **H.R. 6281, introduced June 23, 1913:**

> Section 6 in this Act is identical with Section 6 in H. R. 4319, except that the word "a" has been inserted in the latter immediately preceding "municipal water district".

(4) H.R. 6914, introduced July 18, 1913:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

(5) H.R. 7207, introduced August 1, 1913:

Section 6 in this Act is identical with Section 6 in H. R. 6914, except that the words "or the electric energy" are added in H.R. 7207 immediately following the words "the water".

(6) The Raker Act approved December 19, 1913 (38 Stats. 242):

Section 6 of H.R. 7207, which became a law, was amended between introduction and enactment and as enacted read as follows:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

**(d) It is significant that through the Congressional debates upon the Raker Act there was no suggestion that Section 6 meant anything more than a prohibition of sale for resale; that those who spoke to the point all affirmed that to be its purpose and meaning; and that not a word spoken in Congress can be quoted in support of the second view of the meaning of Section 6.**

As stated under subdivision (c) supra, Mr. Raker introduced five Hetch Hetchy bills, the last H.R. 7207, on August 1, 1913.

On August 5, 1913, this latter bill was reported favorably by the House Committee on the Public Lands, without amendment, and referred to the Committee of the Whole.

The bill was discussed on various days subsequent to August 5, 1913 and up to September 3, 1913, when it passed the House.

On August 29, 1913, Mr. Raker explained the occasion for his several bills and that he had introduced H.R. 7207 on August 1, 1913, to embody all of the conclusions which had been reached in the House Committee on the Public Lands (50 Cong. Rec. p. 3900, c. 1 foot) up to that day.

Two amendments to Section 6 were agreed to on August 30, 1913, (a) one striking out the proviso at the end of Section 6 and substituting therefor the proviso found in the enacted bill (50 Cong. Rec. p. 3998, c. 2 foot);[6] and (b) one striking out the words "for such corporation or individual" immediately preceding the words "to sell or sublet"[7] (50 Cong. Rec. p. 3999, c. 2 middle).

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[6]The proviso attached to Section 6 in H.R. 6914 and H.R. 7207, supra, read as follows:

> "Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

The substitute agreed to on August 30, 1913, which appears in the Act as enacted, reads as follows:

> "Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer or convey, this grant shall revert to the Government of the United States."

[7]The words "for such corporation or individual" thus stricken from Section 6 of the Hetch Hetchy grant appear in President Roosevelt's dictation of June 25, 1906 and in The Owens River Grant enacted June 30, 1906, and in the following Hetch Hetchy

In the course of the debate on the bill generally, Representative Towner of Iowa, Representative Thomson of Illinois, a member of the House Committee on the Public Lands, and Representative Ferris of Oklahoma, Chairman of the House Committee on the Public Lands, spoke respecting Section 6 as below stated, and the meaning ascribed by them to Section 6 was never challenged. There was no discussion in the Senate respecting Section 6. (We speak subject to correction.)

Representative Towner (August 29, 1913):

> "It is proposed in this bill that the city can not sell water or power to any corporation or individual to sell or sublet. But it is not provided that the city may not sell to any corporation it chooses all the water or electric energy it desires for its own use." (50 Cong. Rec. Appendix p. 462, c. 2).

Representative Thomson (August 30, 1913):

> "Under the provisions of section 6 the grantee . . . can not sell water or electric energy to any private corporation or individual for the purpose of resale." (50 Cong. Rec. 3980, c. 1 top).
>
> "Is it not correct that this section, as it reads now, provides substantially that the grantee under this act can not sell to any individual or corporation other than a municipality the right to take any of this water and this power and resell it to somebody else? . . . If this language is read carefully I think it will be seen that . . . these municipalities are prohibited from ever selling or letting to any corporation or individual except a municipality the right to take any of this water and this power and resell it." (50 Cong. Rec. 3996, c. 2 top).

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bills: H.R. 112; 4319; 6281; 6914 and 7207, supra; but were dropped as above stated August 30, 1913. These words were used, so we think, by President Theodore Roosevelt to emphasize the object of the prohibition which he dictated, as one forbidding resale, and presumably were dropped in the last stages of the Hetch Hetchy grant as unnecessary.

**Congr. Deb.: Prohibition is sale for resale.**

Representative Thomson (September 2, 1913):

"It says that the city can sell their water power to private individuals or corporations for consumption, but not for the purpose of resale." (50 Cong. Rec. p. 4094, c. 2 middle).

"When this bill was being considered by the committee I offered an amendment to Section 6, . . . by adding the words 'or electric energy'. With those words in that section . . . San Francisco may sell this water or electric energy . . . to any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city for consumption, and only for consumption, and under this section it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it." (50 Cong. Rec. 4096, c. 2 ft.—4097, c. 1 top).

Representative Ferris (September 2, 1913):

"San Francisco could not sell to any soap manufacturer or ice manufacturer anything that they could resell, but they could sell it to them for their own use." (50 Cong. Rec. p. 4093, c. 1 foot).

"There is an express provision to the effect that they can not resell the power in any way. They can sell for use only with a positive restriction against sale for any resale purposes of any sort." (50 Cong. Rec. p. 4093, c. 2 middle).

The foregoing extracts from the Congressional Record leave no doubt (so we submit) that the purpose of Section 6 was to prohibit sale for resale; but in connection therewith we take the point that the language of Section 6 (once the omissions are supplied as in the case of an ellipsis) is so plain that it does not need reenforcement from Congressional debates. The rule established by the authorities assembled in Br. a.c. 86-87 is that where the meaning is plain resort to Congressional debates is not had.

**(e) If we examine Section 6 textually (supplying what we regard as obvious omissions) it will appear, so we submit, that the prohibition contained therein was one against sale for resale.**

The considerations which have been already expressed, supra, cover this point (so we think).

Section 6 deals with "the right [of a buyer corporation or a buyer individual] to sell or sublet the water or the electric energy sold or given to it [the corporation buyer] or him [the individual buyer] by the said grantee".

Therefore, there should be no doubt whatever that the provision deals with a right of a buyer consequent upon a purchase of the water or electric energy ("a buyer" connotes "a sale and purchase"). The section is intended to prevent the creation of a right in a buyer through an act of sale, etc.

In other words Section 6 is dealing with a sale by the grantee under the act (San Francisco) and imposes a prohibition against the ordinarily arising right of the purchaser himself to sell.

If this be a correct analysis of the statute, then it is a prohibition against any sale by the Municipality which would pass on to the buyer the right himself to resell.

**(f) Section 6 cannot be properly interpreted, so we submit, as a prohibition against the granting of a franchise by the Municipality.**

A distributor of water to a community for compensation, when acting as owner and not as agent, requires (a) ownership of water and (b) a franchise to distribute it.

If the owner of water (in this case the Municipality) can only sell that water to a distributor company or individual, for its own use and not for resale, the distributor is denied this source of supply. If on the other hand there are no restrictions upon or prohibitions against the sale of the commodity, then the only question presented would be the question of franchise. If, in that event, the distributor (corporation or individual) possessed a franchise, no difficulty would be encountered in marketing the commodity.

It is fair to assume that Congress would have been alive to the fact, for instance, that the Spring Valley Water Company had a franchise and that therefore the section would be nugatory if it were merely a prohibition against the granting of a franchise. (The Spring Valley Water Company figured on many occasions in the debates which resulted in The Raker Act.)

If as soon as water was available after the approval of the Raker Act and before the purchase of the Spring Valley Water Company's properties, the City sold all of the water to the Spring Valley Water Company and the Spring Valley Water Company distributed it with its own water, would the Government have any cause of action? It could not object, upon the assumption with which we are now dealing, that the City had sold the Hetch Hetchy water to the Spring Valley Water Company and there could be no objection to the Spring Valley Water Company as owner distributing the water to the inhabitants of San Francisco under its own franchise. The Government, in the instance supposed, would be without any remedy.

The interpretation of the prohibition as one merely against the granting of a franchise would seem to be totally inadequate to the purpose of Congress and the comprehensive prohibition would be one of sale for resale. (See extracts from the Congressional debates, (d), pp. 29-30, supra.)

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Another instance: Let us assume that San Francisco made in 1914 an agreement to sell all of its water to the Peoples Water Company and, the constitutional grant of 1879 being no longer available, agreed to give it a franchise to distribute the water. Would the Government be entitled to maintain an action to enjoin the Municipality from granting such a franchise? And if the people, by constitutional amendment, granted such a franchise, could the Government protest? If the franchise had been granted could the Government sue to have it revoked?

Take the present situation:

If the contract of July 1, 1925 were treated as a sale, there would be no objection to it as one forbidden by Section 6 under the assumed interpretation. The City does not purport in the contract of July 1, 1925 to confer a franchise on the Pacific Gas and Electric Company. It is acting on the basis that the Company has authority to distribute. Could the general government bring a suit in *quo warranto* to oust it from the distribution of Hetch Hetchy electric energy or could it bring an action to oust it from the streets of the Municipality?

A construction of a statute which gives rise to grave doubts about its constitutionality is to be avoided. (*Labor Board v. Jones & Laughlin,* 301 U.S. 1, 30; *Anniston Mfg. Co. v. Davis,* 301 U.S. 337, 351-352; *Chippewa Indians v. United States,* 301 U.S. 358, 376 top (1937). We submit that to say Section 6 prohibits the granting of franchises by the Municipality would do more than raise grave doubts about its constitutionality.

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If, moreover, the contract of July 1, 1925 is one of agency, then the Company is distributing the power as the agent of the Municipality which needs no franchise itself to distribute.

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We submit that a thoughtful consideration of the foregoing will lead to the conclusion that Section 6 does not deal with franchises but merely with sales to be coupled with restrictions whereunder the buyer would not acquire the right itself or himself to sell.

**(g) Once it is concluded that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas.**

Once it is concluded that the purpose of Section 6 was to prevent sales for resale, it will be clear that nothing remains in the prohibition, either in words or ideas, to extend the interpretation beyond a prohibition of sale for purposes of resale.

This has been fully developed in the briefs, and particular attention was given thereto in Outline of Oral Argument, pages 8-24, to which we invite the attention of the Court.

**(h) There is no other condition in the Raker Act (one leading to forfeiture) except that contained in the proviso to Section 6 which declares that "the rights hereby granted shall not be sold . . . and in case of any attempt to [do] so . . . this grant shall revert to the Government of the United States". In connection with this point, we review Section 9, subsection (u), which limits the remedies of the Government to suit, and Section 11, which prescribes that the grant shall be in subordination to the law of waters of the State of California.**

We here quote the following provisions of the Act:

"Sec. 6. . . . Provided That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

Sec. 9, sub-sec. (u). . . . "Provided, however, That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

Sec. 11. "That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or

other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State."

As stated, (c), supra, p. 26, five Hetch Hetchy bills were introduced by Representative Raker in 1913.

Section 11 above quoted appears in the fourth and fifth Bills, i. e., H.R. 6914, introduced July 18, 1913, and H.R. 7207, introduced August 1, 1913.

The reverter clause in the proviso to Section 6 did not appear in either of the two Bills last mentioned nor in any earlier bill but was added August 30, 1913, supra, p. 28, footnote 6.

Section 9, subsection (u), never appeared in any of the Bills, but was added September 2, 1913, the day immediately preceding the passage of the Act in the House, which was September 3, 1913 (R. 72 ft., 75 ft.). The proceedings in the House which led to the inclusion of Section 9, subsection (u), are shown in adequate fullness in R. 70-75.

From the foregoing, it follows that in point of enactment, Section 9, subsection (u), was last.

That provision, as will be seen (R. 70-75), was to wipe out all possibilities of forfeiture except, say, the proviso of Section 6.

The word "condition" or "conditions" appears thirteen times in the Act; once in Section 1, eleven times in Section 9, and once in Section 11. Excluding reference to the word in Section 9, subsection (u), and Section 11 above quoted,

the eleven occasions where one or the other of these two words is used are as follows:

(1) Sec. 1. "under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture."

(2) Sec. 9. "That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:"

(3) Sec. 9, sub-sec. (a), subd. Fourth. "The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee."

(4) Sec. 9, sub-sec. (d). "upon the express condition, however, that the said grantee may require the said irrigation districts to purchase and pay for a minimum quantity of such stored water."

(5) Sec. 9, sub-sec. (1). "no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein."

(6) Sec. 9, sub-sec. (m). "That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years."

(7) Sec. 9, sub-sec. (n). "and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development" etc.

(8) Sec. 9, sub-sec. (p). "That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic

road or trail, as the Secretary of the Interior may determine."

(9) Sec. 9, sub-sec. (q). ". . . it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed."

(10) Sec. 9, sub-sec. (r). "That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations . . . which . . . involve expense . . . then such expense shall be borne by said grantee."

(11) Sec. 9, sub-sec. (s): "That the grantee shall file . . . its acceptance of the terms and conditions of this grant".

We may therefore dismiss any question about what conditions the Government might have imposed in making the grant. The Act contains but a single instance of a condition, using the word in its technical sense, and the only remedy for any violation of the grant by the Municipality except in the one instance mentioned is by suit of the Government.

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In connection with Section 11 above quoted which declares that the Raker Act is in subordination to the water laws of the State of California, we invite attention to the fact that neither in The Owens River Grant to Los Angeles, nor in The Raker Act, did Congress assume to have control over or interest in the water.

The title of The Owens River Grant is this: "An Act authorizing and directing the Secretary of the Interior to sell to the city of Los Angeles, California, certain public lands in California; and granting rights in, over, and

through the Sierra Forest Reserve, the Santa Barbara Forest Reserve, and the San Gabriel Timber Land Reserve, California, to the city of Los Angeles, California".

The title of The Raker Act is this: "An Act granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest and the public lands in the State of California, and for other purposes".

It was suggested from the Bench during the argument that the real property of the Government might appropriately be considered as participating in the creation of the energy and that hence it was not therefore entirely accurate to say that the Government only furnished the facilities by which the Municipality itself captured its own water and created its own energy.

It is possible that the argument by the Municipality on this point is not of substantial importance, but inasmuch as Congress itself recognized that the Government had no participation in the capture of the water owned by the City, nor in the generation of the electric energy created by the City by the use of its own water these facts should be taken for granted. In these circumstances we submit that the contention of the City that the Government cannot be fairly said to have done more than afforded facilities is a meritorious one.

**(i) Having fully discussed the interpretation of Section 6, it will be helpful to show from the Congressional debates that the consensus of opinion in Congress in passing the Raker Act was that the imposition of "conditions" in the Hetch Hetchy grant was an exercise of power by a proprietor and not an emanation from the law-making authority; that the Government had no interest in the water; that Congress did not intend to grant it, and that the source of title to the water was the State of California.**

The question whether the prohibitions of Section 6 of the Raker Act are statutory or contractual, or both, has been muchly considered in the briefs (see Outline of Oral Argument, p. 22), and it is of interest that the views of the members of Congress support the claim that as matter of construction it should be held that these prohibitions are imposed by a proprietor and do not emanate from the lawmaking power.

The debates also throw light on another matter.

Although Congress did not attempt any grant of waters and studiously abstained therefrom, yet the source of title to the waters is of importance and interest. It will be appropriate therefore to show from the debates that there was unanimity of view that the source of title to the waters was the state and not the general government.

We now give extracts from the debates respecting both these matters.

Representative Raker, August 29, 1913:

> "The theory on which this bill is drawn is that the United States, having sole jurisdiction over the national park, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantee. The bill is not drafted nor designed nor intended to usurp

the powers of the State of California in the matter of control of the distribution of water." (50 Cong. Rec. p. 3900, c. 1 middle).

Secretary Lane, August 29, 1913 (testimony given by him at an earlier hearing but laid before the House on the day just stated):

"The general principle of the bill is that these lands belong to the Federal Government and that we have control of them. The water originates in them, the water flows through them, and we have control over the dam site, and if we are to allow these lands to be submerged we have got the right to make certain conditions. Certainly no one can come in and use lands in a national park without our consent, and if you give consent you have got the right to make conditions." (50 Cong. Rec. p. 3907, c. 1 middle).

Representative French of Idaho, August 30, 1913:

"As has been stated in the report of the Committee on the Public Lands, the theory on which this bill is drawn is that the United States, having the sole jurisdiction over the Yosemite National Park, the Stanislaus National Forest, and the public lands that would be involved in the grant, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantees." (50 Cong. Rec. p. 3967, c. 1 middle).

Representative Thomson of Illinois, August 30, 1913:

"This is not so much a legislative act or grant as it is a contract between the Government and San Francisco and these other cities, in which we, representing the Government, not only may but should place proper and reasonable conditions. That Congress has the right to impose such conditions there can be no question". (50 Cong. Rec. p. 3979, c. 1 foot.)

**Congressional Debates: Source of Title to Water: Conditions are those of a Proprietor.**

Representative Ferris of Oklahoma, September 2, 1913:

"We, of course, must not invade the State laws where parties have prescribed water rights." (50 Cong. Rec. p. 4096, c. 1 foot).

Representative Mann of Illinois, September 2, 1913:

"It is a principle of law that Congress in granting a right can grant it on conditions and provide for its ending as it pleases, regardless of courts." (50 Cong. Rec. p. 4104, c. 2 middle.)

Representative Mondell of Wyoming, September 2, 1913:

"I do not claim that the Federal Government may not fix conditions on a grant of a right of way. . . . It might make a condition as to a grant of right of way over which water is to be carried that the city shall not charge over a certain amount for the water furnished to its citizens. That is a condition that I should not consider necessary or proper, but it does not impair a constitutional right. What I claim is that Congress has no power to shorten the sovereignty of a State. . . . In the bill are a lot of provisions they think may be enforced, contrary to that rule, through the medium of a contract. I do not think it is good legislation." (50 Cong. Rec. p. 4111, c. 1, middle.)

Senator Borah of Idaho, October 4, 1913:

"The Government is not undertaking to regulate and control the waters of the State of California, but it is simply attaching a condition to a specific grant which it is making to the city of San Francisco, as a proprietor and not as a sovereign." (50 Cong. Rec. p. 5472, c. 2 ft.)

Senator Pittman of Nevada, October 7, 1913:

". . . this bill does not grant any water rights to anyone; it does not take away any water rights from anyone;" (50 Cong. Rec. 5494, c. 1 ft.)

**Congressional Debates: Source of Title to Water: Conditions are those of a Proprietor.**

Senator Smoot of Utah, December 1, 1913:

". . . the only way in which San Francisco can have her needs supplied is under the laws of California. San Francisco can make appropriations of the water, and I understand she has already done so. If she has made these appropriations, all that prevents her from going on with the project is that she must have an act of Congress authorizing her to construct a pipe line over the public domain and build a reservoir. . . . That will give her all the rights Congress can give her. It will give her a right of way to enable her to use every drop of water to which she is entitled. She is not entitled to a gallon of water she has not appropriated under the laws of California, no matter how many bills we pass in Congress purporting to grant her more." (51 Cong. Rec. p. 13, c. 1 middle).

Senator Thomas of Colorado, December 3, 1913:

". . . the city of San Francisco is not attempting, and could not if it would attempt, to secure a grant from the Government of the United States of any water power whatever." (51 Cong. Rec. p. 132, c. 1 ft.)

Senator Lippitt of Rhode Island, December 3, 1913:

"As I understand the way the act is drawn, the United States gives a right of way to the city of San Francisco and that is substantially all it gives. And the dam site." (51 Cong. Rec. p. 135, c. 2 middle.)

Senator Smoot of Utah, December 3, 1913:

"The Government of the United States does not own any water." (51 Cong. Rec. p. 136, c. 1 middle).

Senator Brandegee of Connecticut, December 4, 1913:

". . . if the Government is the proprietor of land I have no doubt whatever of the power of the Government to sell its land or to grant any less estate than a fee simple under

**Congressional Debates: Source of Title to Water: Conditions are those of a Proprietor.**

whatever conditions it may attach, which are, in my opinion, the same as those which any other proprietor of land may attach." (51 Cong. Rec. p. 183, c. 1 top.)

Senator Borah of Idaho, December 5, 1913:

"I have no doubt of the power of the National Government to attach such conditions to this grant as any other proprietor may attach to a grant of land, and I have no doubt of the proposition that the Government can attach no other conditions that an individual proprietor of land could attach to a grant of land; in other words, the National Government cannot, in making a grant of this kind, combine its proprietary rights with its sovereign power and do things as a proprietor because it is a Government that it could not do as a proprietor if it were not a Government." (51 Cong. Rec. p. 286, c. 2 middle.)

**(j) It is to be remembered that although the Government had full power to attach conditions to the grant, nevertheless we are concerned only with the conditions which it did impose and are not to concern ourselves with conditions which it might have imposed.**

As already shown, the only condition which the Government imposed in the Hetch Hetchy grant is contained in the proviso to Section 6, which provides that "the rights hereby granted [lands and interests in lands] shall not be sold" etc. otherwise a reverter ensues. Therefore the relations between the parties in all other particulars arise out of covenants and are contractual unless they also emanate from the lawmaking power, in which event they are statutory as well.

**(k) Conclusion of considerations arising out of The Statute.**

We therefore conclude our discussion of The Statute, and pass to the consideration of The Contract.

## II. THE CONTRACT.

The Contract has been adequately dealt with in the briefs but we add a short consideration of some features which may be profitably noted, and also give consideration to questions suggested at the argument.

(a) It was asked at the argument whether there was an intermingled supply of electricity involved in *Los Angeles Gas & Electric Corporation v. Los Angeles,* 188 Cal. 307 (1922). There was not. See pp. 311 middle, 313 foot, 318 foot and 320 middle.

While mention of this fact is made in the opinion, the case is not made to rest upon that circumstance and the case is not authority that there cannot be an agency if there be intermingled supplies of electricity.

The opinion says, "the contract is one for the distribution of 62,500 horse-power of electrical energy to customers mostly within the City of Los Angeles, 25,000 of it to be supplied by the companies and 37,500 by the city. The contract specifically provides that the city is to purchase the 25,000 horse-power from the electrical and power companies and that the power lines of the companies are to be used for the distribution of the electrical energy of the city." (p. 311.)

The case was cited, Br. a.c. 17, to the point that the parties to the contract of July 1, 1925 had before them a ruling that electricity might be distributed through an agent, and in the light of that decision were seeking to make their contract one of agency. In the Outline of Oral Argument, page 21 foot, language was inadvertently used which did or might be interpreted to say that the *Los*

*Angeles* case was one of intermingled energy. This was an error.

The aspect of the *Los Angeles* case, which is important here, is well brought out in Brief for Appellant, page 36, to which we invite the attention of the Court.

(b) In Br. a.c. p. 40, attention is called to the fact that in its opinion, the District Court practically took no notice of the importance of intention in the construction of the contract and used the word "intent" or "intended" in its opinion on three occasions only, there specified.

There is a like disregard of "intention" in the Government's brief. The only places therein where the importance of the intent of the parties is recognized are these:

(1) Page 23: "The real nature of the contract is determined by the intent of the parties as manifested by the substance of the contract and by their acts, and is not controlled by the mere words and forms of the contract".

(2) Pages 29-30: "The district court recognized and correctly applied the accepted principles of construction of such instruments, including the cardinal rule that the true intent of the parties must govern".

(3) Page 31: "It clearly appears that the parties contemplated a contract to, and did in fact, buy and sell the electric energy".

(4) Page 31: "The brief *amicus curiae* proceeding on the proposition that intention to pass title is important on the question of sale contends in effect that because some

of the terminology used is indicative of agency that that terminology is controlling''.

(5) Page 42: ''It was obviously not intended that final account between the parties should await the ascertainment of the average revenue per unit at the end of the current year''.

(6) Page 45: ''This evidence [that of Mr. Vincent, Vice President and Executive Engineer of the Pacific Gas & Electric Company, called as a witness by the Government] shows that the eighth paragraph was intended to have no more binding and operative effect than was in practice given to it. A fixed price was contemplated.''

The foregoing is the sum total of all discussion in the Government's brief on the subject of the intent of the parties as governing the interpretation of the contract.

We shall speak below of the quotation from page 45 above respecting the eighth paragraph of the contract.

(c) The opening paragraph of the contract is followed immediately by a number of recitals, after which follow the contractual paragraphs of the contract.

The closing paragraph (Fifteenth) reads as follows:

> ''FIFTEENTH: The recitals hereinabove contained commencing with the words 'Whereas, the City has now completed the construction of the Moccasin Power Plant', and ending with the words 'a great loss of potential revenue to the City and its taxpayers; and' are statements made by the City of its purposes and intentions and concerning other matters contained in said recitals. Said recitals are not and no one of them is

made by or on behalf of the Company. None of said recitals shall be binding on either of the parties to this agreement in any dispute, controversy or question which may ever hereafter arise in which the same might otherwise be relevant or pertinent."

Speaking of this paragraph, the Government's brief says (p. 9): "The recitals are not binding on either party". (See Br. a.c. 97-98.)

The matter is not important but it is worth an explanation. Evidently the Municipality desired in the contract to set forth its purposes and plans and other related matter, and did so. It would have been inappropriate for the Company to have assumed that it could speak to the purposes and plans of the Municipality and therefore (we must assume) it was provided: "Said recitals are not and no one of them is made by or on behalf of the Company". Evidently, the Municipality thought that if the recitals were not made by or on behalf of the Company, they would not be binding on the Company in the event controversy arose and it protected itself by providing that the recitals should not be binding on either party if any dispute, etc., thereafter arose.

This point therefore is of no importance to the questions at bar.

(d) The contract provides that:

". . . 76 per cent of the energy consigned and delivered at Newark should be taken as the true measure of the amount possible of deliverance to consumers" (Par. Third).

". . . that inasmuch as in the year 1924 under existing rates the average revenue received by the Company . . . amounted to 2.383 cents per kilowatt hour, such average revenue should be applied to 76 per cent of the energy" (Par. Fourth).

". . . that the City shall receive . . . 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark, and that the Company shall receive 73.065 per cent thereof" (Par. Fifth).

This was an attempt by the Municipality and the Company to give the Municipality the revenue properly appertaining to its own energy after deduction of compensation to the distributor, wholly in line with the ruling in *Los Angeles Gas & Electric Corporation v. City of Los Angeles,* 188 Cal. 307, 205 Pac. 125, as set out in Brief for Appellant, pages 36-37.

(e) The payment on or before the fifteenth of each month following the delivery of the power was designed to give ample time for the Company to make its collections. From the nature of things there could not be an invariable coincidence in collections by the Company and payment to the City, but for practical purposes the collections may be assumed to have preceded the payment.

(f) The accounting was in form and in purpose from an agent to a principal as near as the circumstances would allow considering that the Municipality had an inadequate supply which required supplementing in order to serve the purposes of the inhabitants of the Municipality.

(g) At the final hearing the Government, assuming the burden of proof, called a witness to show that there had been official reductions in the rates in 1935, 1936 and 1937 (ten, eleven and twelve years after the making of the contract) which gave an average rate of return below that fixed in the contract by 1, 6 and 11%, and yet the amount paid to the City remained unchanged. This is dealt with in the Government's brief at page 43. It is also treated in Brief for Appellant, pp. 35-39; Brief Amicus Curiae, pp. 54-62; Outline of Oral Argument, pp. 27-28, and little remains to be added thereto.

Inquiry was made at the oral argument as to whether there was any change in the average revenue consequent upon change of wages, etc., and if that were important, upon whom the burden of proof in respect thereof would lie.

We assume that the burden of proof would be upon the Government. Moreover, the fact that the parties made no effort to readjust the figures in the contract would lead one to suppose that changes compensated one another and that the rate was approximately correct. Indeed, Mr. Vincent testified that there was a variation covering twelve years collectively of about one-tenth of one per cent. He said:

> "From August 1, 1925 to the end of December, 1937, estimating the three months of the year still to run, the average revenue of our Company from the sale of electric energy sold in San Francisco was 2.381 cents per kilowatt hour as compared with 2.383 cents per kilowatt hour used as the return base in the contract of July 1, 1925. This is a dif-

ference of less than one-tenth of one per cent." (R. 299:2-11; Br. a.c. p. 56.)

(h) As we live in a practical world and as the approximation can be only as exact as circumstances will allow, there is a clear case made that the result reached was as accurate as possible and in full subordination to the requirements of an agency contract.

(i) There is nothing to show that the factors had not been reexamined from time to time by the contracting parties separately or in conference, nor that there would be variation as a result of the conference. Furthermore, if the parties should have conferred and readjusted oftener than they did, that would not invalidate the contract nor turn an agency into a sale.

(j) The Municipality is not called upon to find the word "agent" in Section 6. A sale of the energy is prohibited, and if no sale occurred, that is a sufficient answer to the case of the Government. The Municipality is quite within the law because the line drawn by Section 6 is sale or no sale and "the very meaning of a line in the law is that you intentionally may go as close to it as you can, if you do not pass it" (*Superior Oil Co. v. Mississippi,* 280 U.S. 390, 395 foot (1930), opinion by Mr. Justice Holmes). See, also, Outline of Oral Argument, pp. 20-22; also Br. a.c. pp. 85-93.

It is respectfully submitted that the decree of the Court below should be reversed, with directions to dismiss the bill.

Dated, San Francisco, June 9, 1939.

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